

NOT FOR CITATION
 IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

HERBERT ALEXANDER,

Petitioner,

vs.

JOHN W. HAVILAND, Warden,

Respondent.

No. C 09-04773 JF (PR)

ORDER GRANTING MOTION TO
DISMISS

(Docket Nos. 6 & 7)

Petitioner, a state prisoner, filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent filed a motion to dismiss the petition as second or successive. (Docket No. 6.) Petitioner filed a motion to withdraw the petition, to allow him to seek leave from the Ninth Circuit to file a second or successive petition. (Docket No. 7.)

It is undisputed that Petitioner previously filed a petition for a writ of habeas corpus which was denied on the merits on August 6, 1996. See C-94-2535 MMC (OEW); (Resp't Mot. at 1). The instant petition is therefore the second filed by Petitioner challenging the same conviction and sentence. A district court must dismiss claims presented in a second or successive habeas petition challenging the

1 same conviction and sentence unless the claims presented in the previous petition
2 were denied for failure to exhaust. See 28 U.S.C. § 2244(b)(1); Babbitt v.
3 Woodford, 177 F.3d 744, 745-46 (9th Cir. 1999). Additionally, a district court must
4 dismiss any new claims raised in a successive petition unless the petitioner received
5 an order from the court of appeals authorizing the district court to consider the
6 petition. See 28 U.S.C. § 2244(b)(2).

7 Here, the instant petition challenges the same sentence as the previous
8 petition and Petitioner has not presented an order from the Ninth Circuit Court of
9 Appeals authorizing this Court to consider any new claims. Petitioner's first petition
10 was adjudicated on the merits in this Court's order denying the petition in August
11 1996. Accordingly, this Court must dismiss the instant petition in its entirety.

12 Respondent's motion to dismiss, (Docket No. 6), is GRANTED. The instant
13 petition is DISMISSED as a second and successive petition pursuant to § 2244
14 (b)(1). Petitioner's motion to withdraw the petition, (Docket No. 7), is DENIED as
15 moot.

16 This order terminates Docket Nos. 6 and 7.

17 IT IS SO ORDERED.

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19 DATED: 5/17/10

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21 JEREMY FOGEL
22 United States District Judge
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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

HERBERT ALEXANDER,
Petitioner,

Case Number: CV09-04773 JF

CERTIFICATE OF SERVICE

v.

JOHN W. HAVILAND, Warden,
Respondent.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 5/21/10, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Herbert Alexander E-50502
California State Prison-Solano
P.O. Box 4000
Vacaville, CA 95696

Dated: 5/21/10

Richard W. Wieking, Clerk